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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

TOMMY LYNN AUGMON,

Defendant and Appellant.

A140790

(San Mateo County
Super. Ct. No. SC077831A)

Appellant Tommy Augmon received a stipulated prison sentence as part of a plea bargain. The court recalled Augmon's sentence pursuant to Penal Code section 1170, subdivision (b),¹ and Augmon sought to withdraw his plea or alternatively to dismiss an admitted sentence enhancing prior strike conviction. The court denied both motions and returned Augmon to state prison. It failed, however, to resentence Augmon before doing so. Augmon contends this was error, requiring remand for the court to re-impose sentence and recalculate custody credits. The People agree. So do we.

BACKGROUND

Augmon was charged by amended information with one count of residential burglary (§§ 459, 460, subd. (a)).² It was alleged that he had suffered a prior violent felony conviction constituting a strike (§§ 667, subds. (a), (d)–(i)), and three prior convictions resulting in terms of imprisonment (§ 667.5, subd. (b)). Pursuant to a plea

¹ Undesignated statutory references are to the Penal Code.

² The circumstances underlying the charge are not relevant to the single issue presented in this appeal.

agreement, Augmon entered a plea of no contest on May 28, 2013, to the residential burglary and admitted the strike prior and one prior felony conviction resulting in imprisonment. The plea agreement included a stipulated prison term of five years (two-year low term doubled, with a consecutive one-year enhancement for a prior term of imprisonment). No appeal was taken.

Augmon later filed a petition for writ of error *coram nobis* seeking to withdraw his plea on the ground of newly available exculpatory evidence. Following a hearing on September 11, 2013, the court denied Augmon's application to withdraw his no contest plea but ordered Augmon's sentence recalled in order to allow him to pursue a motion to dismiss his strike prior (*Romero v. Superior Court* (1996) 13 Cal.4th 497, 518, 529–530). On November 19, 2013, after hearing, the court denied the motion to dismiss, citing the agreed terms of the plea bargain. (See *People v. Segura* (2008) 44 Cal.4th 921, 931 [“ ‘[o]nce the court has accepted the terms of the negotiated plea, “[it] lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree” ’ ”].) The court did not resentence Augmon.

A notice of appeal was filed on January 17, 2014, purporting to challenge the validity of Augmon's plea³ and denial of the writ of error *coram nobis*.

DISCUSSION

We note first that no cognizable issue is presented as to the validity of Augmon's May 28, 2013 no contest plea. He was sentenced to state prison and judgment was entered on that same date. No timely appeal was taken from that judgment. Moreover, Augmon presents no argument on that issue in his appellate brief.

Likewise, no timely appeal was taken from the denial of his petition for writ of error *coram nobis*. That order was entered, both orally and in the court's minutes, on September 11, 2013. While both the minute order, and the court's oral pronouncement on November 19, 2013, recited that the “request to recall the sentence and modify [it] is denied,” the court was required to recall the sentence, if at all, within 120 days of the

³ The court granted a certificate of probable cause (§ 1237.5).

original May 2013 commitment or lose jurisdiction. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 464.) Augmon again appears to recognize this, and presents no argument on this point either.

It appears that the trial court inadvertently overlooked its earlier order, entered on September 11, 2013, *granting* the motion to recall Augmon's sentence. Under section 1170, subdivision (d)(1), the court was required to "resentence the defendant in the same manner as if he or she had not previously been sentenced." The People appropriately agree that this error resulted in "an unauthorized absence of sentence." (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1472.)

DISPOSITION

The matter is remanded to the trial court for imposition of sentence in accordance with the terms of Augmon's plea agreement and for recalculation of appropriate custodial credits.

Bruiniers, J.

We concur:

Jones, P. J.

Simons, J.